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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. [redacted] 101

FRANK DeNIRO, JR., MICHAEL DeNIRO, and LOUIS DeNIRO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK DeNIRO, JR.,
MICHAEL DeNIRO, and
LOUIS DeNIRO,
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OPINION BY THE COURT BELOW

The United States Court of Appeals for the Sixth Circuit delivered an opinion in this matter, which opinion has not yet been published. This opinion is set forth in the appendix hereto at pages 1a-10a of this Petition.

JURISDICTION OF THIS COURT

The Petitioners herein request review of a judgment of the United States Court of Appeals for the Sixth Circuit which judgment was entered of record therein on April 15, 1968. This judgment affirmed a verdict of guilty and

a judgment entered in the United States District Court for the Northern District of Ohio, Eastern Division, on October 15, 1965.

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit is conferred in Title 28, §1254(1).

QUESTIONS PRESENTED

I.

Did not the Court of Appeals for the Sixth Circuit, in its refusal to follow *Ingram v. United States* and the holding therein set forth that guilty knowledge is the first prerequisite to criminal culpability, improperly justify the trial court's casual rejection of knowledge and specific intent as elements of the offenses charged, thereby depriving the petitioners of their right to a judgment predicated upon governing principles of law?

II.

Did not the Court of Appeals for the Sixth Circuit err in sustaining the trial court's finding of conspiracy to violate federal law in the absence of the requisites thereof and upon the assumption that a supposed endeavor by petitioners to defraud the heirs of a decedent effected a transfer of intent into the field of federal criminal law and that specific intent was thereby supplied?

STATUTES INVOLVED

UNITED STATES CODE ANNOTATED

Title 18 Crimes and Criminal Procedure:

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (18 U.S.C. §371.)

Title 26 Internal Revenue Code of 1954:

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (26 U.S.C. 1964 ed., Sec. 7201.)

Title 26 Internal Revenue Code of 1954:

Sec. 7206. Fraud and False Statements.

Any person who —

• • • •

(2) Aid or assistance.— Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim or other document, which is fraudulent, or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

• • • • (26 U.S.C. 1964 ed., Sec. 7206.)

STATEMENT OF THE CASE

On July 17, 1961, James Vincent DeNiro, known as Vince DeNiro, the brother of the petitioners herein, was killed by the explosion of a bomb which had been attached to the ignition of his automobile. His nearest of kin were two daughters of a marriage which had terminated in divorce. The decedent had, at various times during his life, acquired sizable sums of money and considerable physical assets. He was most secretive as to his assets and held visible or record title to nothing of any consequence at the time of his death. The government, in its brief in this matter, assumed, and both lower courts accepted this assumption, that if Vince DeNiro had ever owned the various properties considered, his placing of title thereto in the names of his brothers (the three petitioners herein) was a subterfuge and was known and recognized by the petitioners as a subterfuge.

Petitioners were indicted for conspiracy to defraud the United States and to violate various substantive statutes (Title 18, §371); for willful attempt to evade Federal Estate Tax (Title 26, §7201); and for three alleged false statements under Title 18, §1001. The false statement counts were dismissed by the trial judge upon motion.

Petitioners waived jury trial and proceeded to trial in Cleveland before the Honorable Frank J. Battisti, in the United States District Court for the Northern District of Ohio, Eastern Division. The defendants elected not to offer any evidence and to rely upon their motions for judgment of acquittal. These motions were eventually overruled and the trial judge found the petitioners guilty of conspiracy and willfully attempting to evade Federal Estate Tax. Frank and Michael DeNiro were fined $1,000 each on the conspiracy charge and were placed on probation for two years on the tax evasion charge. Louis DeNiro was in effect

sentenced to 90 days in the Cuyahoga County Jail respecting the conspiracy charge and was fined $3,000 on the evasion charge. The court made and announced findings of fact and conclusions of law (Appendix, pages 11a-18a).

Appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, which affirmed the judgment in an opinion set forth in the appendix hereto (pages 1a-10a).

The petitioners, although relatively young men, were meagerly educated and considered their record ownership as evidencing actual ownership of the corporate interests represented thereby. They also considered and stated to investigators that Vince had been the record owner of no corporate interest. Their attitude in this respect was influenced strongly by the advice which the attorney who had been employed by Vince for the several enterprises involved had given them after Vince's death. The attorney had advised petitioners that regardless of the minimal amount of the purchase price of their corporate shares, such shares represented true and legal ownership of an interest in the corporation proportionate to the number thereof which they held; that Vince had been free to make available to them such shares at any value that he chose; and that their ownership of the corporate interest represented thereby was bona fide and proper in all respects.

The properties which the Government contended belonged to Vince at the time of his death and therefore represented assets in his estate were:

(1) National Cigarette Service, a cigarette distributing company, fifty-five per cent (55%) of the shares of which had been purchased by the petitioners for a nominal price long before Vince's death. The balance of the shares thereof were in the names of other individuals.

(2) Valley Land Company, a housing development in which petitioner Michael DeNiro believed that he held an

interest by reason of the fact that he had mortgaged his home in order to make available to Vince a part of the purchase money therefor, Michael being noted of record as a shareholder therein. Vince's divorced wife had likewise invested money in this company. It is interesting to note that the seller of Valley Land considered Valley Land to have been, after his sale thereof, the property of National Cigarette Service.

(3) Cicero's Restaurant, a corporation which was owned, insofar as the corporate attorney knew, by one Cochran and one Dominic Frank.

(4) Fifty Thousand Dollars ($50,000) cash, which represented the proceeds of a loan effected by National Cigarette Service and which was repaid by National Cigarette Service through contributions by the petitioners. The deceased Vince had promoted the loan and had taken possession of the proceeds.

Little is to be gained in this proceeding from a detailed statement concerning the intricacies of the acquisition of the properties involved by Vince, his motives in placing title to these assets in the petitioners (and others); or the refusal of the petitioners to accept the title theories of the investigating agent.

Both the District Court and the Court of Appeals considered and disposed of this case as though it were a civil tax case. The controlling issues were: (1) knowledge of the existence of a federal "estate tax", (2) intent to evade such tax, and (3) the existence of a conspiracy. These considerations were casually brushed aside by those courts.

In the fifteen months following Vince's death, Internal Revenue Agent John Relic interviewed petitioners on various occasions. The period in which it is required that a federal estate tax return be filed is, of course, fifteen months (T.26, §6075). *Not once during this fifteen month period did Relic ever mention federal estate tax to these uneducated petitioners.* Actually he had stated on each occasion

during the fifteen month period that his concern was confined to the *income tax status* of the petitioner Louis DeNiro and that of the deceased Vince. Even after the expiration of this period Relic was still questioning Louis DeNiro concerning *income tax* and only casually mentioned *estate tax*. Nineteen months after Vince's death Relic first mentioned estate tax to petitioners Frank and Michael DeNiro.

Relic, on no occasion ever explained to these petitioners the meaning of the term "estate tax", did not differentiate it from income tax or *inheritance* tax, and persisted in his representations that Vince owned everything and that petitioners owned nothing.

No probate proceeding was ever instituted by petitioners or anyone else concerning Vince's alleged assets. The attorney referred to above had advised petitioners that Vince had no estate.

The trial court accepted the government's figures as to the value of the estate which Vince allegedly owned at the time of his death. The Court of Appeals accepted the net valuation placed upon Vince's purported assets by the trial court (and the Internal Revenue Service) as $215,816.43 with an estate tax liability thereon of $55,444.93. This valuation completely ignores even the actual investment which the petitioners had personally invested in or paid on behalf of the several corporations. It completely ignores the fact that $50,000.00 in cash which was included in the net figure set forth above was not the property of Vince, as was evidenced by the fact that the petitioners laboriously over the years repaid the loan which had been the source of this cash.

Both the trial court and the Court of Appeals attached excessive and controlling significance to the fact that, even

> "... that in the formative stage of the scheme the brothers were ignorant of the federal estate tax, there

if conceded

> came a point at which it was brought forcefully to their attention. On November 20, 1962 Louis was placed on notice by Special Agent Relic, of the Government's interest in collecting federal estate tax, and of the criminal penalties for attempted avoidance of such tax. On March 11, 1963, the other two brothers were given adequate notice by Relic of the claims of the Government with respect to the federal estate tax, and of the consequences of evasion. In spite of the above, the brothers continued to maintain that Vince left no estate and that they owned the assets which the court found belonged to him." (Appendix, page).

The petitioners contended strongly in both the trial court and the Court of Appeals that to require blind acceptance of a revenue agent's analysis or that of any other policeman, despite legal advice to the contrary as in the instant matter, upon pain of a judicial finding of knowledge, intent and conspiracy, is to effectively dispel the requirement of proof beyond a reasonable doubt as to the elements of knowledge and intent and to substitute therefor guilt by official announcement or accusation. The petitioners have consistently contended that the attitude of the two lower courts was improperly based upon suspicion and surmise, and not upon proof of knowledge or intent or the elements of conspiracy.

Both of the courts below assumed that the petitioners had undertaken ". . . to gather together and secure permanent possession of these and all other properties which had belonged to their deceased brother to the exclusion of his rightful heirs." The petitioners contended strongly, with respect to this consideration, that even if the petitioners had conspired to commit a *state* or *non-federal* wrong, such fact, in the absence of any knowledge of a federal statute prohibiting such conduct or of a specific intent to violate federal law, cannot work a *transference* of illegality or impropriety from state to federal spheres.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be granted in this matter for the following reasons:

(a) The Court of Appeals herein utterly ignored the holding and basic rationale of *Ingram v. United States*, 360 U.S. 672 (1959).

(b) The Court of Appeals herein sanctioned a conviction based upon the strange thesis that if one perpetrates a non-federal wrong and in so doing unknowingly and unintentionally violates a federal criminal statute which requires proof of specific intent, the specific intent is somehow supplied by the fact that the non-federal wrong was perpetrated, and in this action departed so far from accepted and usual procedures as to call for an exercise of this Court's power of supervision.

(c) The Court of Appeals herein found the elements of knowledge and specific intent to have come into existence through the fact that an Internal Revenue Agent accused petitioners of a criminal violation of federal law, and held that such accusation supplied the requisite knowledge upon which to predicate a finding of specific intent, thereby dispensing with the necessity of proof beyond a reasonable doubt. It is submitted that this also evidences a departure to such extent from accepted and usual procedures as to call for an exercise of this Court's power of supervision.

ARGUMENT

QUESTION NO. I

DID NOT THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, IN ITS REFUSAL TO FOLLOW *INGRAM V. UNITED STATES* AND THE HOLDING THEREIN SET FORTH THAT GUILTY KNOWLEDGE IS THE FIRST PREREQUISITE TO CRIMINAL CULPABILITY, IMPROPERLY

JUSTIFY THE TRIAL COURT'S CASUAL REJECTION OF KNOWLEDGE AND SPECIFIC INTENT AS ELEMENTS OF THE OFFENSES CHARGED, THEREBY DEPRIVING THE PETITIONERS OF THEIR RIGHT TO A JUDGMENT PREDICATED UPON GOVERNING PRINCIPLES OF LAW?

A.—General Considerations—The element of knowledge.

The substantive statutes involved in this case are Sections 7201 and 7206(2), Title 26, United States Code. These sections state criminal offenses which embrace the element of *specific intent*. The conspiracy aspect of the case under Title 18, Section 371, United States Code, likewise involves *specific intent* for the statutes embraced in the conspiracy count and the fraud alleged therein require proof of *specific intent*.

> "Conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *Spies v. United States*, 317 U.S. 492. (emphasis added)

Specific intent cannot exist, however, without knowledge. *Direct Sales Company v. United States*, 319 U.S. 703 (1943).

It is and has been the contention of the petitioners herein that they were completely ignorant of the existence of the federal estate tax; that without knowledge of such tax and of the fact that such tax was due and owing there can be no intent to evade same; and that in the absence of a specific intent to evade such tax there can be no offense in the instant matter. It is the further contention of the petitioners that the record in this matter is completely devoid of any evidence probative in the slightest degree of the vital elements of *knowledge* and *intent*.

It is submitted that the off-hand statement of the Revenue Agent concerning *estate tax* after he had inquired exclusively into income tax matters for a period of from fifteen to nineteen months could not have served to have

endowed the petitioners with culpable knowledge and a derivative specific intent.

If, as both of the lower courts herein have held, the elements of knowledge and intent can be provided through an accusation or expression of opinion by a policeman or investigative officer, *scienter* and *mens rea* are no longer viable considerations in our law.

This court, in *Ingram v. United States*, 360 U.S. 672 (1959) conclusively stated the basics of knowledge, intent and conspiracy. The petitioners in the instant matter stand in a situation analagous to that of the two employee-defendants in *Ingram* of whom the Court said at page 677:

> "As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal the operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal *under Federal law*. Certainly there is nothing in the record to show that Smith and Law knew that Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter.
>
> "'*Without the knowledge the intent cannot exist* ***.' Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal." (emphasis added)

It is set forth on page 679 of *Ingram* that Smith and Law (the employees) were *knowing participants* in a criminal enterprise under *state law*:

> "Certainly the secrecy of the operation did not go to show knowledge. This is not a case where efforts at concealment would be reasonably explainable *only* in terms of motivation to evade taxation. Here the criminality of the enterprise under local law provided more than sufficient reasons for the secrecy in which it was conducted."

Thus the court held that unless there was a *specific intent* to evade tax there could be no offense under the indictment

—even though a conspiracy existed for other purposes such as in *Ingram,* a conspiracy to operate an illegal lottery and to conceal same and its operation from local law enforcement agencies.

Even earlier, in *United States v. Murdock,* 290 U.S. 389 (1933), it was set forth that it cannot be said that intent to do a state wrong presumes an intent to defraud the Government.

Thus, if it were to be admitted *arguendo* that petitioners had intended to cheat the lawful heirs of the deceased brother, neither the scheme nor acts done to effectuate same could conceivably bear upon or import federal criminality in the absence of proof beyond a reasonable doubt respecting knowledge of federal estate tax due and owing and an intent to evade the payment of same.

In *United States v. Jones,* U.S. Tax Cases 64-1, page 9350, U.S. District Court, Georgia, Atlantic Division, 3-19-64, a case wherein the defendant was charged with having willfully attempted to evade a tax, the Court stated in its instructions to the jury:

> "The word 'Wilful' as used in Section 7201 of the Internal Revenue Code of 1954, with which the defendant stands charged *means with knowledge of the obligation to pay the tax due,* and *with intent to defraud the goverinment of that tax.*
> "There must be *willful* and positive commission of an act or acts in an attempt to defeat or evade the taxes. In other words, there must have been a *specific wrongful intent, that is, actual knowledge of the existence of the obligation and a wrongful intent to defeat or evade it.*" (emphasis supplied)

B.—The element of willfullness or specific intent and its absence in this case. Can there be a valid federal conviction of an individual who willfully perpetrates a state wrong if he has neither knowledge of a federal

statute proscriptive of the same act nor intent to violate such statute?

Inasmuch as the case at bar involves the element or issue of *specific intent* its disposition must be on a basis which is consistent with the holding of this Court in *Morissette v. United States*, 342 U.S. 246 (1952) wherein the matter of federal criminal intent was discussed definitively and in detail.

In *Morissette* it was stated that in offenses wherein intent must be established as an element, no presumption of intent can arise merely by reason of the fact that the proscribed act was committed:

> "Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

This doctrine is believed particularly applicable to this case because the Government sedulously attempted to generate the element of intent in this case through a presumption of intent. The trial judge was of the belief that even though there was no knowledge of a tax due and owing, and even if there were no intent to evade or to aid and abet the preparation or presentation of a false return, if a non-related "fraud" had been perpetrated by the appellants, such fraud would provide the missing intent in regard to the offenses actually charged. The trial judge seems to have been greatly influenced by his belief that appellants were trying to "defraud" Vince's "rightful heirs" of such assets as Vince might have had (Conclusion of Law Number 1, page . ., Appendix).

In *Spies v. United States*, 317 U.S. 492, 498, 499, it was held that willfulness is a necessary element in the offense of willfully attempting to evade or defeat a tax. The Court

further represented that *if* "* * * tax-evasion plays any part in such conduct, the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." (emphasis supplied) See also *Ingram v. United States,* 360 U.S. 672.

It is important to note, however, that lacking "tax-evasion motive", concealment for other purposes cannot serve as a basis for conviction of an alleged willful attempt to evade or defeat a tax.

The requirement that specific intent be proved beyond a reasonable doubt has been forcefully stated by the courts in *United States v. Murdock,* 290 U.S. 389 (1933), *Battjes v. United States,* 172 F2d. 1 (CA 6, 1949), *Wardlaw v. United States,* 203 F2d. 884 (CA 5, 1953).

Even in civil tax cases the courts require "clear and convincing evidence". *Hawkins v. Commissioner,* 234 F2d. 359 (CA 6, 1956). In attempting to ascertain whether an understatement was the result of fraudulent intent, the courts rely on the level of intelligence of the taxpayer and his knowledge of bookkeeping methods. *Prentice Hall Tax Service,* Volume 5, page 37.242.

It is the burden of the Government to establish specific intent by the requisite degree of criminal proof. The Government did not maintain that burden in the instant case. If the burden is onerous it is because Congress intended that it be so. An objective review of the evidence reflects a fabric of unsubstantiated inferences pyramided upon and interwoven with unsubstantiated inferences. Criminal convictions should not result from this quality of evidence.

QUESTION NO. II

DID NOT THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN SUSTAINING THE TRIAL COURT'S FINDING OF CONSPIRACY TO VIOLATE

FEDERAL LAW IN THE ABSENCE OF THE REQUISITES THEREOF AND UPON THE ASSUMPTION THAT A SUPPOSED ENDEAVOR BY PETITIONERS TO DEFRAUD THE HEIRS OF A DECEDENT EFFECTED A TRANSFER OF INTENT INTO THE FIELD OF FEDERAL CRIMINAL LAW AND THAT SPECIFIC INTENT WAS THEREBY SUPPLIED?

Count II of the indictment charges both conspiracy to defraud the United States and conspiracy to violate substantive statutes. Proof of *specific intent* by evidence which convinces beyond a reasonable doubt is essential if the Government is to prevail under such charge. The Government did not offer proof of this nature.

Respecting the charge of conspiracy to defraud the United States, it is basic that the common law meaning of fraud be applied. *United States v. Turley*, 352 U.S. 407 (1957). It is further basic that common law fraud requires proof of the elements of knowledge and specific intent.

Concerning the charge of conspiracy to violate certain federal tax statutes, such tax statutes explicitly require proof of *specific intent.*

The trial judge became imbued with the consideration that if petitioners had attempted to defraud the "rightful heirs of Vince DeNiro" (Conclusion of Law Number 1, Appendix, pg. ..) such fraud effected a transference of evil motive and intent in such manner that if, by reason of the initial, non-tax oriented fraud, the Government were impeded and impaired in its ascertainment, computation, assessment and collection of the federal estate tax, an intent to defraud the Government would be imputed to petitioners. The Court of Appeals supported the trial judge in this view. It is completely opposed, however, to the holding of this Court in *Ingram v. United States*, 360 U.S. 672.

In *United States v. Belisle,* 107 F. Supp. 283 (DC Wash., 1951) and *United States v. Woll,* 157 F. Supp. 704 (DC Pa., 1957) the courts held that in order to sustain a charge of conspiracy to defraud the United States, the United States must establish by evidence beyond a reasonable doubt the existence of *specific intent.* See also *Morissette v. United States,* 342 U.S. 246 (1952).

> "An intent to defraud cannot be presumed from an *unlawful* act which does not bespeak fraud." (Emphasis supplied).
>
> • • •
>
> "The color of the act determines the complexion of the intent only in those situations where common experience has found a reliable correlation between a particular act and a corresponding intent." *Hubbard v. United States,* 79 F2d. 850, 853 (CA 9, 1935).

In the absence of proof beyond a reasonable doubt as to the element of specific intent to defraud the United States, it is difficult to perceive how the petitioners herein could be found to have conspired.

In addition to this consideration it is believed significant to observe that the record in this case is completely lacking in evidence probative of *agreement* to jointly do the thing charged. *Ingram v. United States,* 360 U.S. 672, 677. There is no proof of a common purpose. *United States v. Goss,* 329 F2d. 180 (CA 4, 1964).

Concerning the charge of conspiracy to violate the designated tax statutes, the requirements of proof of specific intent are as demanding of the Government as with respect to conspiracy to defraud the United States.

> "'Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.'" *Ingram v. United States, supra.*
>
> "Without knowledge the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. This because charges of

conspiracy are not to be made out by piling inference upon inference." *Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943).

"It is fundamental that a conviction for conspiracy under 18 U.S.C. Section 371 cannot be sustained *unless there is proof of an agreement to commit an offense against the United States.*" (emphasis added) *Ingram v. United States, supra.*

It is not believed that the fundamentals of conspiracy were proved by the Government or considered by the District Court or the Court of Appeals.

CONCLUSION

It is submitted that the petitioners were shorn of their right to a trial which was governed by those legal concepts and considerations which have long been held controlling in matters such as this.

It is submitted that the Court of Appeals erred to the great prejudice and harm of these petitioners in its rejection of the vital elements of knowledge and specific intent; in its acceptance of proof by accusation; and in the formulation of a doctrine contrary to the holdings of this court by which a transference of intent, notwithstanding an utter lack of knowledge or intent respecting federal law, is effected through a perpetration of a state or other non-federal wrong.

WHEREFORE, petitioners pray that a Writ of Certiorari issue from this Court to the United States Court of Appeals for the Sixth Circuit and that they be given leave to present these matters on their merits.

Respectfully submitted,
FRANK DENIRO, JR.,
MICHAEL DENIRO, and
LOUIS DENIRO

JAMES J. CARROLL AND SAMUEL E. KARAM,
Attorneys for Petitioners.

APPENDIX A

Nos. 17053,-054,-055
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeals from United States District Court for the Northern District of Ohio, Eastern Division

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No. 17,053
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK DeNIRO, JR.,
Defendant-Appellant.

No. 17,054
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL DeNIRO,
Defendant-Appellant.

No. 17,055
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOUIS DeNIRO,
Defendant-Appellant.

Decided April 15, 1968.

[Filed April 15, 1968]

Before WEICK, Chief Judge, PECK and COMBS, Circuit Judges.

WEICK, Chief Judge. The three DeNiro brothers, appellants here, waived a jury and were tried in the District Court on a five-count indictment charging them with (1) conspiracy; (2) attempted evasion of federal estate taxes; and (3), (4) and (5) making false statements to Internal Revenue Agents, in violation of 18 U.S.C. §371, 26 U.S.C. (1964 ed.) §7201, and 18 U.S.C. §1001. At the close of the government's case the DeNiros moved for judgments of acquittal. The court reserved ruling thereon, and they elected not to proceed further, and rested. They renewed their motion for judgment of acquittal. The court adopted findings of fact and conclusions of law, and found them guilty on counts 1 and 2, which charged conspiracy and the substantive offense of attempted evasion of federal estate taxes. The court dismissed counts 3, 4 and 5 of the indictment, which charged them with the substantive offenses of making false statements.

Frank and Michael were each fined one thousand dollars on count 1, and were placed on two years' probation on count 2. Louis was fined three thousand dollars on count 2 and sentenced to three years' imprisonment on count 1, the first ninety days of which sentence were to be spent in a jail type institution, and the remainder of the sentence was to be served on probation.

The charges arose out of the death of appellants' older brother, James Vincent DeNiro, known as Vince DeNiro, who had accumulated wealth in the numbers business in Youngstown, Ohio. Vince met his death when he endeavored to start his automobile, thereby detonating a bomb which someone had attached to the ignition switch. The court found that Vince died intestate, leaving a gross estate of $311,047.08 and a net taxable estate of $215,816.43, upon which the federal estate tax liability amounted to $55,444.93.

Vince's estate was never probated.[1] His lawful heirs were his two children by his former wife, Mary DeNiro.

The Government's theory was that after Vince's death the three brothers, acting in concert, took possession of and appropriated all of the assets of Vince's estate, to the exclusion of his children who were his lawful heirs; that they concealed the assets and obstructed an investigation of Internal Revenue Agents by giving to them false statements to the effect that Vince left no estate and that they had none of his assets; and that one of their purposes was to evade payment of the federal estate tax.[2]

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[1] The gross estate was found to consist of the following: 100% ownership of Valley Land, Inc. (rental duplexes), with equity valued at $79,262.70; 100% ownership of Cicero's, Inc. (restaurant and bar), with equity value at $101,000; 55% ownership of National Cigarette Service, Inc., with equity valued at $80,784.38; a $25,000-outstanding loan to an individual; and $25,000 in currency placed with a local banker for safekeeping. It might be pointed out that the 55% ownership of National Cigarette attributed to Vince is a conservative figure in view of the testimony of John Hughes, Administrator of the estate of his deceased brother, James Hughes. His testimony was to the effect that there was no stock in National Cigarette Service among the assets of that estate, which was probated in 1960. James Hughes was supposed to own a 10% stock interest in this company. Carl Rango also testified that although he had been listed as a partner in National Cigarette, he had never held such an interest.

[2] The relevant provisions of the Code (Title 26) provide substantively as follows: Section 2001 imposes on a taxable estate of $100,000 to $250,000, a tax of $20,700 plus 30% of the excess over $100,000.

Section 2002 provides that the executor shall pay such tax.

In Section 2203 an executor is defined as the executor or administrator, or where none has been appointed, " . . . any person in actual or constructive possession of any property of the decedent."

Section 6018(a) (1) provides that the return shall be filed in all cases where the gross estate exceeds $60,000.

Section 6075 provides that the return shall be filed within fifteen months following the date of death.

18 U.S.C. § 371 provides in part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

26 U.S.C. § 7201 provides:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Although Vince had been quite successful in amassing wealth during his lifetime, he had always been careful to keep record title of his property in the names of others. This practice was graphically illustrated by the fact that not one of the assets of his substantial estate was actually recorded in his name. At least three persons, other than the brothers, discovered after Vince's death that they held title of record to property belonging to Vince.

The investigation by the Internal Revenue Agents originated as an inqury into the failure of Louis DeNiro to file federal income tax returns for the years 1957, 1958 and 1959. It commenced on April 19, 1962, when Louis was interviewed by Special Agent John B. Relic. During the interview Louis denied that he received anything from Vince's estate, denied that Vince left an estate, and denied that he had received any substantial gifts from Vince during the latter's lifetime. Louis asserted that he was the owner of Cicero's; that he borrowed all of the money with which to purchase it; and that Vince had never owned any part of Cicero's. Subsequent interviews with Frank and Michael produced equally emphatic denials that Vince had left an estate. In a meeting on November 20, 1962, Louis told Relic that Vince had no interest in Cicero's or National Cigarette Service, and that he doubted whether Vince had any interest in Valley Land at the time of his death. He said that his brothers bought their interest in National Cigarette from Vince. Relic told Louis that the Government was interested in collecting taxes if there was any tax liability due.[3] Louis was also informed by Relic that there were criminal penalties for conspiring to evade estate tax liability, but Louis maintained that Vince had no interest in these companies.

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[3] Under the provisions of 26 U.S.C. § 6075 (see footnote 2), the return should have been filed not later than October 17, 1962.

In an interview on March 11, 1963, Special Agent Relic first told Frank, and then both Frank and Michael, that the Government was going to prosecute the brothers for attempted evasion of the estate tax liability of Vince, and might even charge them with conspiracy; that it was the position of the Government that Vince had an estate and that the brothers knew it and took over all the assets and divided the assets among themselves and wilfully tried to evade the estate tax. Special Agent Relic went over with them each of the items of the estate, but they persisted in their denials that Vince left any estate.

The District Judge found that the brothers were aware of Vince's practice of utilizing nominees and straws to conceal his ownership of property; that they were aware that Frank and Michael were serving as mere nominees in their ownership of National Cigarette stock, with beneficial ownership residing in Vince; and that they knew that at the time of his death Vince owned Cicero's (subject to a further payment of $32,000 to a former stockholder). The trial judge also found:

> 'On the date of Vince's death, the defendants . . . summoned Edward Cochran to Cicero's . . . and there they agreed to gather together and secure permanent possession of these and all other properties which had belonged to their deceased brother to the exclusion of his rightful heirs.''

The trial judge further found that the defendants knew that the investigation being conducted by Special Agent Relic could jeopardize the scheme to convert Vince's assets to their own use, and that, realizing this, the defendants —

> ''. . . agreed among themselves to lie to and mislead Agent Relic and the Internal Revenue Service about the true facts concerning the properties owned by their deceased brother. This they did well knowing that such

> a course of conduct would necessarily impede, impair, obstruct and defeat the lawful governmental function of the Revenue Service in the ascertainment, computation, assessment and collection of the revenue."

In the appeal appellants have urged three grounds for reversal. They are: First, that the District Judge erred in overruling the defendants' motions for judgments of acquittal; Second, that the evidence was insufficient to sustain the verdict; and Third, that there was insufficient evidence of willfulness.

In *United States v. Carter*, 311 F.2d 934, 940 (6th Cir.) *cert. denied*, 373 U.S. 915 (1963), this court said:

> "In determining whether the evidence was sufficient to withstand a motion for acquittal, the evidence must be viewed in the light most favorable to the prosecution. This rule applies to a case tried to a District Judge as well as to a case tried to a jury."

Even under a standard less stringent than that enunciated above, the defendants on the record here would not have been entitled to the relief which they sought. The trial judge properly overruled the motions for judgments of acquittal.

Going one step further, the appellants' contention that there is insufficient evidence to sustain the convictions, is likewise without merit. In our opinion, there was abundant evidence from which the trial judge could have found the defendants guilty of the crimes with which they were charged in counts 1 and 2 of the indictment. We will point out only the most damaging of this evidence.

Prior to its incorporation in 1955, National Cigarette was a partnership, in which Vince held a 51% interest. Following incorporation, Vince was not listed as a stockholder, but instead Frank was shown as owner of 38% and

Louis the owner of 17% of the total authorized shares.[4] Although Frank was the president of National Cigarette, he did not actually start to work for the company until early 1961, when business became "bad" in his used car lot. Michael began working for the company subsequent to Vince's death.

In August, 1961, Louis collected a $25,000 loan which had been made by Vince to Jules Aron, and which was evidenced by Aron's personal check, with Vince shown as payee. In October, 1961, the appellants collected the $25,000 which Vince had left with a bank official for safekeeping, by giving to the bank a surety bond to indemnify it against liability. After appellants gave the bond to the bank, the money was turned over to Frank.

The testimony of Edward Cochran shed considerable light on Vince's affairs. Mr. Cochran had been a business associate of Vince in both Valley Land and Cicero's. At one time Cochran had been the sole stockholder in Valley Land, but prior to his death Vince acquired complete ownership of that corporation. Shortly after its incorporation, Cochran and Vince each held a one-half interest in Cicero's, but in April or May of 1961 Vince agreed to and did purchase Cochran's share for $42,000, $10,000 of which had been paid at the time of Vince's death.

On the date of Vince's death, the brothers procured the services of an attorney to prepare options for National Cigarette to purchase from Helen Cochran and Dominic Frank shares of stock in Cicero's. The brothers represented

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[4] National Cigarette was incorporated with one hundred authorized shares. Although Frank and Louis claimed that they paid Vince five dollars per share for their shares, they immediately signed the certificates for the shares in blank, and those certificates and the certificates of three other record owners, endorsed in blank, were used indiscriminately by Vince as security for large personal loans.

to the attorney that they had purchased this stock and had nothing to show for it; and that the options were to reflect an actual prior verbal agreement to that effect. The options were prepared on the day of Vince's death and were backdated to January 30, 1961. The signatures of the necessary parties to the options were immediately obtained. (At this time, although Vince was the beneficial owner of all the shares of stock in Cicero's, the shares were of record in the names of Edward Cochran's wife, Helen Cochran, and Dominic Frank, a gentleman whose interest in Cicero's preceded that of both Cochran and Vince.) However, in December, 1961, when informed by the attorney that the minority stockholders of National Cigarette would by the terms of this agreement acquire an interest in Cicero's, the brothers had the attorney prepare new options running in favor of Louis, rather than National Cigarette.

The above recitals are but illustrative of the substantial evidence upon which the trial judge relied in finding the brothers guilty of attempted evasion of federal estate tax and of conspiring to commit the crime charged in count 1.

The third ground urged by the brothers for reversal is that they did not *willfully* evade federal estate taxes. They have maintained here, as they did in the court below, that even if it is demonstrated that they consciously converted the assets of Vince's estate to their own use, they did not do so with the requisite intent of evading federal estate taxes. It is their position that even though they may be guilty (and this they do not admit) of an attempt to defraud Vince's heirs, at no time was there intertwined with such scheme a purpose to evade the federal estate taxes on such assets.[5] It is strenuously argued that none of the

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[5] Doubtless one of the purposes of the brothers' scheme was to deprive Vince's heirs of his estate, but they also conspired to evade the taxes due from the estate. As was said by the court in *Ingram v. United States*, 360 U.S. 672, 679-680 (1959):

"A conspiracy, to be sure, may have multiple objectives, . . . and if one of its objectives, even a minor one, be the evasion of federal taxes, the offense is made out, though the primary objective may be concealment of another crime."

brothers graduated from high school[6] and that none of them comprehended the nuances of federal estate taxation.

The essential elements of a tax evasion prosecution are summarized in *Sansone v. United States,* 380 U.S. 343, 351 (1965), where the court said:

> "As has been held by this Court, the elements of §7201 are willfulness; the existence of a tax deficiency . . .; and an affirmative act constituting an evasion or attempted evasion of the tax . . . ."

In *United States v. Andrews,* 347 F.2d 207 (6th Cir.) *cert. denied,* 382 U.S. 956 (1965), this court in reviewing a conviction for willful evasion of the gambling tax, held that in order to sustain a conviction of conspiracy to evade those laws there must be knowledge on the part of the defendants that the tax is due and has not been paid. However, this knowledge need not be shown by direct evidence, and the circumstances of the case may be sufficient to show that the defendants knew that the tax was owed.[7]

In *United States v. Murdock,* 290 U.S. 389, 394 (1933), the court, in discussing a prosecution for willful refusal to supply information, said:

> "The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose . . .; without justifiable excuse . . .; stubbornly, obstinately, perversely . . . ."

The gravamen of Section 7201 is the specific intent or design to deprive the Government of taxes. *Edwards v. United States,* 375 F.2d 862 (9th Cir. 1967); *United States*

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[6] In *Fowler v. United States,* 352 F.2d 100, 111 (8th Cir. 1965) *cert. denied,* 383 U.S. 907 (1966), a prosecution for evasion of federal income taxes, the defendants were shown to have third and eighth grade educations, but the court remarked: ". . . capacity is measurable by more than just . . . formal education."

[7] See *Ingram v. United States,* 360 U.S. 672 (1959); *Holland v. United States,* 348 U.S. 121 (1954); *Spies v. United States,* 317 U.S. 492 (1943); *United States v. Schipani,* 362 F.2d 825 (2nd Cir.) *cert. denied,* 385 U.S. 934 (1966).

v. Schipani, 362 F.2d 825 (2nd Cir.) *cert. denied*, 385 U.S. 934 (1966).

Thus, under the authority cited above, the brothers, in order to be found guilty, must have had the specific intent of evading the federal estate taxes. We are of the view that the record shows such precise purpose of mind. Even if it is conceded that in the formative stages of the scheme the brothers were ignorant of the federal estate eax, there came a point at which it was brought forcefully to their attention. On November 20, 1962, Louis was placed on notice by Special Agent Relic, of the Government's interest in collecting the federal estate tax, and of the criminal penalties for attempted avoidance of such tax.

On March 11, 1963, the other two brothers were given adequate notice by Relic of the claims of the Government with respect to the federal estate tax, and of the consequences of evasion.[8] In spite of the above, the brothers continued to maintain that Vince left no estate and that they owned the assets which the court found belonged to him.

The judgment of the lower court is affirmed.

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[8] As the court said in *Hill v. United States*, 363 F.2d 176, 180 (5th Cir. 1966) (involving income tax evasion prosecution):

"(W)here a defendant has an opportunity to correct his return, and is put on notice that such correction is necessary, his failure to take steps to file an amended return is a proper matter for a jury to consider in determining intent or lack of intent."

APPENDIX B

The findings of fact and conclusions of law found and entered by the trial judge in the United States District Court for the Northern District of Ohio, Eastern Division.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(2) BATTISTI, *J.*: First, I think that the better rule is that established by the Paternostro case, and I am dismissing Counts 3, 4 and 5 of the indictment.

My findings of fact and conclusions of law are as follows:

1. Vincent DeNiro died, intestate, on July 17, 1961.

2. At the time he died he was single. Surviving him were two minor children of a marriage that had been dissolved by divorce in 1950.

3. The two children were the rightful heirs to any property Vince DeNiro may have owned at the time of his death.

4. No estate was probated for Vince DeNiro. No federal estate tax return was filed.

5. In the years preceding his death, Vince DeNiro was in the numbers business and had access to large sums of currency. He invested this currency in several business enterprises. The pattern of these investments showed a conscious design on his part to utilize compliant nominees and straws so as to avoid any record, public or private, of his own ownership. Defendants were aware of this.

(3) 6. In 1957, Vince DeNrio purchased a 50% interest in the Valley Land Corporation by investing $20,000 in currency directly into the corporation. Edward Cochran and Helen Cochran owned the other 50%. In 1958 he purchased the Cochrans' interest for $30,000 but the Cochrans continued as record owners of their former stock for several years. Vince DeNiro was in complete control of the corporation from that time on and defendants were aware of this. Moreover, they were aware that they themselves had made

no investment in Valley Land and that they owned no interest in it.

7. Dominic Frank, Edward Cochran and Vince DeNiro were associated in a Youngstown restaurant enterprise known as Cicero's. In the beginning each owned a one-third interest, Frank as a result of his purchase of the original liquor license for $20,000 and Cochran and Vince as a result of cash expenditures for remodeling and improvements. In 1960, Cochran and Vince bought out Dominic Frank for $20,000, $10,000 paid by each. As a result Vince and Cochran then owned 50% of the corporation, Cicero's Inc., which owned the restaurant. Defendants, particularly Frank DeNiro, were aware of this transaction and state (4) of affairs. In April or May of 1961, Vince acquired ownership of all the stock in Cicero's Inc., by virtue of an agreement with Cochran to purchase his 50% interest for $42,000. He paid Cochran $10,000 in currency at the time the agreement was made, although again, the Cochrans continued to be record owners of what had been their interest. Defendants subsequently became aware of this. (See No. 16 of my findings.)

8. The pattern of nominee ownership by Vince DeNiro to mask his ownership dates back to and is also reflected in the incorporation of National Cigarette Service of Youngstown, Inc. in 1955. Prior to its incorporation, National Cigarette was a partnership, controlled completely, even as a matter of record, by Vince DeNiro. Following its incorporation, he had 55% of the 100 outstanding shares placed in the names of his brothers, Frank and Louis. They were also listed as corporate officers although they did not participate in the business at all. Shortly after the incorporation Frank and Louis, along with three other record owners, endorsed their stock in blank. It was placed in escrow for loans negotiated by Vince, the proceeds of which he

(5) utilized for his own personal ventures and not for any purpose of the corporation. Thus, Frank and Louis were nominees for Vince. He had complete control of the stock in their names and they were at all times aware that he could deal with the stock in whatever manner and for whatever purpose he chose. In sum, as to his financial transactions, National Cigarette was Vince DeNiro's alter ego and defendants were aware of this.

9. In July 1960, Vince DeNiro was issued 20,000 shares of Continental Tobacco stock.

10. In February or March 1961, Vince DeNiro gave an officer of the Union National Bank $25,000 in currency to hold for him.

11. In June 1961, Vince DeNiro loaned Jules Aron $25,000 in currency.

12. As of the date of his death then, Vince DeNiro owned 100% of Cicero's Incorporated, 100% of Valley Land, Incorporated, and at least 55% of National Cigarette Incorporated. He was owed $25,000 by Jules Aron and possessed $25,000 which was being kept by the Union National Bank in safekeeping for him. Further, he owned 20,000 shares of stock in Continental Tobacco Co., Inc.

13. Based upon valuation of these assets, (6) Vince De Niro had a gross estate of $311,047.08 and a net taxable estate of $215,816.43. The federal estate tax liability on such an estate is $55,444.93.

14. On the date of Vince's death, the defendants, Frank, Louis, and Michael DeNiro, summoned Edward Cochran to Cicero's and learned from him the facts concerning Vince's acquisition of complete ownership of Valley Land and Cicero's. (The interest in Cicero's was qualified by a debt of $32,000 still owed on the purchase price for Cochran's 50% interest.) Then and there they agreed to gather together and secure permanent possession of these and

all other properties which had belonged to their deceased brother to the exclusion of his rightful heirs.

15. They immediately summoned an attorney and caused him to prepare "option to purchase agreements," backdated to a date prior to Vince's death. These purported to show a previous sale by Dominic Frank and the Cochrans of their interests in Cicero's to National Cigarette rather than to Vince. They then secured, again immediately, the necessary signatures to these documents.

16. Shortly thereafter Louis DeNiro forged Vince's signature as an endorsement to the (7) Continental Tobacco stock certificate and prepared or caused to be prepared an attachment to it purporting to show a transfer of the stock by Vince to Louis in April 1961. Louis then caused the stock to be transferred to his name.

17. In August 1961, Louis DeNiro obtained from Jules Aron the $25,000 which Vince had loaned him in June.

18. During September 1961, spurious corporate records were prepared on the instruction of Frank and Mike De Niro to make it appear that Mike was a one-quarter owner of Valley Land, Inc.

19. In October 1961, defendant acquired the $25,000 which had been held for Vince at the Union National Bank.

20. In December 1961, the original plan to place ownership of Cicero's in National Cigarette was changed and a new set of backdated option agreements was prepared showing ownership of Cicero's by Louis DeNiro.

21. Frank, Louis and Michael DeNiro thus marshalled all the assets of Vince DeNiro's estate and agreed to do anything that was necessary to maintain permanent possession (8) of them.

22. Beginning in April 1962 and continuing to April 1963, Special Agent John Relic of the Internal Revenue

Service spoke with the defendants jointly and separately on six separate occasions.

23. In the first interview defendants were informed who Relic was and that his business was investigation of federal tax matters. He informed Louis that he was starting an investigation of his personal income tax liability.

24. Defendants knew that such an investigation could lead to the exposure of their scheme to cheat Vince's heirs out of his property. They also knew that to admit the true facts concerning their acquisition of the property would expose the scheme then and there. Finally they knew, and subsequently were specifically informed, that if it was discovered that Vince had owned the properties in question, the properties themselves could be subjected to levy for any back taxes owed by Vince.

25. Then and there defendants agreed among themselves to lie to and mislead Agent Relic and the Internal Revenue Service about the true (9) facts concerning the properties owned by their deceased brother. This they did well knowing that such a course of conduct would necessarily impede, impair, obstruct and defeat the lawful governmental function of the Revenue Service in the ascertainment, computation, assessment and collection of the revenue.

26. During the course of the several conversations with Relic defendants adopted the position and specifically stated to him that Vince DeNiro left no estate and that they had owned the various properties in question all along. They lied to him concerning the details of their acquisition of these properties and they lied to him concerning their own personal financial affairs as they might bear on the acquisition of these properties.

27. On two occasions they sought the advice of an attorney as to what they should tell the agent as to how they

acquired the property. (On previous occasions, when seeking his assistance in the preparation of various documents, they withheld from him and misled him as to material facts which were to be reflected by the documents.)

(10) 28. In April 1962, Agent Relic specifically cautioned defendants to the effect that the making of false statements to him during his investigation could subject them to federal criminal prosecution.

29. On August 22, 1962, Frank DeNiro stated to Agent Relic that he did not have any property belonging to Vince DeNiro's estate.

30. On August 22, 1962, Michael DeNiro stated to Agent Relic that he did not have any property belonging to Vince DeNiro's estate.

(I realize that some of these findings bear on the sections that I have dismissed from the indictment, but nevertheless they remain as findings of fact.)

31. All of the properties in question belonged to Vince DeNiro's estate and were jointly gathered together by Louis, Frank, and Michael DeNiro, each sharing equally in the actual ownership, and were so held by them on August 22, 1962.

32. In November 1962, defendants were specifically placed on notice as to the existence of a federal estate tax.

33. In April 1963, Agent Relic outlined (11) to defendants what he had discovered during the course of his investigation. He explained to them that this could result in their prosecution for conspiring to evade estate taxes.

34. Nevertheless, and in the face of findings 28, 32, and 33, defendants maintained their original position to the effect that Vince DeNiro did not own any of the properties in question, that he died without an estate, and that they were holding nothing which belonged to him or to his estate.

35. On April 16, 1963, Louis DeNiro stated to Agent Relic that Vince DeNiro had endorsed the Continental Tobacco stock certificate and that Vince had signed the rider attached thereto.

My conclusions of law are as follows:

1. The evidence in this case shows beyond any reasonable doubt that defendants conspired, first, to defraud the rightful heirs of Vince DeNiro, and secondly, to defraud the United States by obstructing functions of the Revenue Service. From the very beginning, a natural consequence of their conduct, concealment of Vince DeNiro's estate, was the obstruction of the Revenue Service. Then, as of April 1962 (12) and as to the Revenue Service, this concealment took an active turn and defendants thereafter purposely, consciously and affirmatively misled their agents as to the true facts surrounding their acquisition of the various properties which had been owned by their deceased brother, well knowing that such conduct could have no other effect but the obstruction of the Revenue Service.

2. The evidence in this case shows beyond any reasonable doubt that defendants also conspired to evade and did evade estate taxes due and owing from and by the estate of Vince DeNiro. An estate tax liability of $55,444.93 has been established but no estate tax return has ever been filed. Defendants were specifically placed on notice as to the existence of an estate tax requirement in November 1962. Nevertheless they continued to maintain their original position concerning the non-existence of an estate and continued their course of actively misleading the Revenue Service in its attempt to ascertain the true facts.

3. The evidence in this case shows beyond any reasonable doubt that the defendants are (13) guilty of counts 1 and 2 of the indictment.

Gentlemen, I have had extensive arguments here today, and because I was having some problems with this case, I felt it was absolutely necessary. I was not putting you through an exercise, I want you to understand that.

You certainly are to be commended for the very fine work that was done on both sides. It certainly was well done, and I appreciate it. It made my work easier.

A pre-sentence investigation is ordered for the defendants, and they will continue on bond in the same amount.

Adjourn Court.

(Thereupon Court adjourned.)

SUPREME COURT, U. S.

No. 101

FILED

JUN 13 1966

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

FRANK DENIRO, JR., MICHAEL DENIRO, AND LOUIS DENIRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1437

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, having waived a jury trial (R. 2a),[1] were tried and convicted of attempting to defeat and evade the federal tax liability on the estate of their brother, and of conspiracy to do so and to obstruct an Internal Revenue Service investigation into that liability (Pet. 17a). Two of them, Frank and Michael DeNiro, were fined $1000 each and placed on two

[1] "R." references are to petitioners' appendix in the court below.

years' probation. The third, Louis DeNiro, was fined $3000 and sentenced to three years imprisonment, the first 90 days to be spent in confinement and the remainder on probation (Pet. 2a).

The district court expressly found (Pet. 13a-14a, Par. 14) that on the day of their brother's death, petitioners agreed to appropriate all of his assets to the exclusion of his heirs, two surviving children. Federal tax agents, while investigating Louis DeNiro's failure to file income tax returns for 1957-1959, told petitioners that federal law might require payment of estate taxes (Pet. 4a-5a, 14a-16a). Petitioners, by mutual agreement, concealed the existence of an estate and of estate tax liability by falsely representing to the investigating agents that their brother had left no assets and that they themselves had always been the owners of various assets and business enterprises which their brother had in fact owned, but through nominees (Pet. 14a-17a). In affirming the convictions, the court of appeals found (Pet. 6a) "abundant evidence" of guilt.

Although articulated in several ways, petitioners present a single contention: that the element of intent to violate the revenue laws was not present, and that any wrongful intent was only to defraud their brother's heirs. In fact, both the district court (Pet. 15a, Par. 25; Pet. 17a) and the court of appeals (Pet. 10a) have found specially that petitioners entertained a specific intent to commit the federal offenses, a finding fully supported by the evidence that petitioners, after a revenue agent informed them of obligations imposed by federal estate tax statutes, persisted in their

attempts to conceal their brother's assets from the government. It was irrelevant that the intent to violate federal law might have been only one of several purposes of their conspiracy. *Spies* v. *United States*, 317 U.S. 492, 499; cf. *Ingram* v. *United States*, 360 U.S. 672, 679-680.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1968.

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